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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R. M. SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE COURT SHOULD DEAL WITH THIS CASE AS IT CAME HERE AND SET ASIDE THE THIRD CIRCUIT JUDGMENT.

This Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Med. Center, Inc.*, 485 U.S. 80, 86 (1988). *See Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2205 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari."). Doing so here should result in reversal—or, at a minimum, vacatur—of the judgment below, because there is no longer any serious dispute that the sole ground relied upon by the Court of Appeals to enter judgment in respondent's favor was wrong. Because respondent and her amici show faint—or, in the case of the Solicitor General, no—interest in defending that ground, we begin by restating the Third Circuit ruling.

The Third Circuit held that respondent's amended complaint states a Title IX claim because "the NCAA receives dues from member institutions, which receive federal funds." Pet. App. 19a. The receipt of such dues, the court held, "would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds." *Id.* The resulting judgment set aside the District Court dismissal order and "remanded * * * for further proceedings *in accordance with the opinion of this Court*." *Id.* 37a-38a (emphasis added). In "accordance with th[at] opinion," all respondent would have to prove on remand to trigger Title IX is that the NCAA receives membership dues—a fact not in dispute. *Id.* 38a.[1]

The petition thus presented the question whether the Third Circuit correctly held that the NCAA is subject to Title IX based on the receipt of such payments. *See* Pet. i.[2] As we explained in our opening brief, the answer to that question is plainly no. In her brief, respondent does not seriously attempt to defend the Third Circuit ruling on its terms; quite the contrary, she disavows them.[3] The

[1] Respondent is wrong that the "judgment was simply that Smith was entitled to amend her complaint to add allegations." Resp. Br. 33 n.21. The judgment—which is reprinted at Pet. App. 37a-38a and speaks for itself—says nothing of the sort. It does, however, make express that the proceedings on remand must be "in accordance with the [Third Circuit] opinion." *Id.* 38a. Thus, if permitted to stand, the judgment would require the case to proceed under what even the Solicitor General acknowledges is an "incorrect legal standard." U.S. Br. 7.

[2] Respondent and her amici have attempted to overhaul that question to suit their chameleon-like theory of the case. Indeed, respondent switched questions from her opposition to her merits brief. But of course the settled "rule" is "that it is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993); *see id.* at 281 n.10. And this Court has long "disapprove[d]" of "the practice of smuggling additional questions into a case after [it] grant[s] certiorari." *Irvine* v. *California*, 347 U.S. 128, 129 (1954) (Jackson, J.).

[3] *See* Resp. Br. 45 (conceding that the "broad language in the court of appeals' opinion" is "in substantial tension with *Paralyzed*

Solicitor General goes further, taking the Court of Appeals to task for applying "an incorrect legal standard," and arguing that the Third Circuit "holding that petitioner's receipt of dues makes it a recipient is tainted by legal error." U.S. Br. 7; *see id.* 10-15. Because the Third Circuit judgment directs the case to proceed on the basis of that incorrect legal standard—"in accordance with [its] opinion," Pet. App. 38a—and because application of that standard would subject the NCAA to Title IX solely on the basis of its receipt of dues, the judgment should be set aside.

Far from dealing with the case that came to this Court, respondent and her amici devote their efforts to reinventing it. In the process, they cast aside the basic ground rules for adjudication in this Court, urging the Court to affirm based on a dizzying array of new arguments and grounds that are not within the question presented (or even close to it), were not properly raised below, were not considered by the courts below, and are not supported by the record in this case. To justify these tactics, respondent and her amici cling to the rule that a respondent may defend a judgment on alternative grounds. But, as this Court's decisions make clear, that rule plainly does not sanction the type of freestyle, moving-target litigation respondent and her amici seek to thrust upon the Court and the NCAA here.

"While it is true that a respondent may defend a judgment on alternative grounds, [this Court] generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996).[4] That is especially so

Veterans"); *id.* 46 ("respondent does not embrace the suggestion below that the statute and regulation can fairly be understood to apply to mere beneficiaries").

[4] *Accord Cass County, Minn.* v. *Leech Lake Band of Chippewa Indians*, 118 S. Ct. 1904, 1911 n.5 (1998); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 61 n.10 (1996); *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 400 n.7 (1996); *Hudson* v. *McMillian*, 503 U.S. 1, 12 (1992); S. Ct. Rule 14.1.

where, as here, the arguments not only were not considered by the lower courts, but were not properly raised below and are not supported by the record. In such circumstances, the Court typically sets aside the lower court judgment based on the erroneous ground, and remands to allow the lower courts—in the first instance—to consider the new arguments, including whether they have been waived. *See, e.g., Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 551-552 n.3 (1990); *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 812-813 (1985).

There is no reason to depart from that settled practice here. Accordingly, the Court should decide the question presented, set aside the Third Circuit judgment erroneously subjecting the NCAA to Title IX solely on the basis of its receipt of dues, and, if the Court believes it appropriate to do so, remand for consideration of respondent's newly minted arguments—including whether they have been properly raised.[5]

II. THE NCAA IS NOT COVERED BY TITLE IX AS A NON-RECIPIENT.

Respondent begins by arguing—for the first time in this case—that Title IX applies to the NCAA, "whether or not it receives Federal assistance." Resp. Br. 18. In support of this lavish conception of Title IX coverage, respondent argues that Title IX prohibits "discrimination '*under* any education program or activity receiving

[5] In our opening brief, we addressed respondent's alternative "surrogate" argument for subjecting the NCAA to Title IX. *See* Pet. Br. 22-35. Both the District Court and the Court of Appeals, however, had addressed that argument in considering whether the NCAA is subject to Title IX on the basis of "the relationship between the members of the NCAA and the organization itself." Pet. App. 16a; *see id.* 14a, 32a-33a; Pet. 21 n.13. Respondent all but abandons this argument in her merits brief, and it is easy to see why—even the Solicitor General agrees that the NCAA cannot be covered by Title IX on the basis of its "unique relationship with its member schools." U.S. Br. 15.

Federal financial assistance,' " not "*by* any education program or activity receiving [such] assistance." *Id.* 17 (quoting Title IX). Based on the same construction, the Solicitor General similarly argues that the determination whether Title IX applies in this case "does not depend solely on whether [petitioner] is a recipient." U.S. Br. 20; *see id.* 21.

This argument should sound familiar to the Court; it was advanced last Term in support of the petitioner's position in *Gebser* v. *Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). *See* Pet. Br. in No. 96-1866, at 18 (arguing that Title IX bars "discrimination 'under any educational program' "); Reply Br. in No. 96-1866, at 5 ("Title IX does not simply prohibit discrimination by the school district; it protects individuals from being subjected to discrimination 'under' a funded program or activity."); U.S. Br. in No. 96-1866, at 19 (same). The argument was unavailing in *Gebser*, and is no more persuasive here.

Perhaps because of the reception the argument received in *Gebser*, respondent and the Solicitor General tailor the construction to the specific objective at hand—extending Title IX to the non-recipient NCAA. Thus, while their theory is still premised on the notion that Title IX reaches any discrimination "under" a federally assisted program—"regardless of whether [the alleged discriminator] is itself a recipient," U.S. Br. 20—respondent and the Solicitor General claim that in this case the Court need only hold that Title IX extends to non-recipients that have been "ceded controlling authority" or "effective control" over such a program. *Id.* 20, 21; *see* Resp. Br. 20. According to the Solicitor General, Title IX is "most naturally read" in this fashion. U.S. Br. 21; *accord* Resp. Br. 17. But of course, there is nothing "natural" about this result-oriented interpretation of Title IX, a statute that says nothing at all about "ceded authority" or "effec-

tive control," and has been consistently interpreted to apply only to recipients of federal aid.[6]

As we explained in our opening brief (pp. 10-13), the language, purpose, and origin of Title IX plainly limit the statute's reach to recipients. *Paralyzed Veterans* holds as much. Even the Solicitor General acknowledges that "[t]here are statements in [*Paralyzed Veterans*] that support petitioner's argument that federal funding statutes like Title IX apply only to recipients of federal financial assistance." U.S. Br. 27. Indeed. *Paralyzed Veterans* makes plain that "Congress limited the scope of [the program-specific statutes] to those who actually 'receive' federal financial assistance because it sought to impose * * * coverage as a form of contractual cost of the recipient's agreement to accept the federal funds." 477 U.S. at 605. *See id.* at 606 (Congress "limit[ed] coverage to recipients"). When it enacted the CRRA, Congress specifically embraced *Paralyzed Veterans*' interpretation of the federal-funding trigger. *See* Pet. Br. 31-32; U.S. Br. 15.

As Spending Clause legislation, Title IX could extend no further. This Court specifically relied upon Title IX's "contractual nature" as Spending Clause legislation in rejecting the effort to extend coverage beyond recipients in *Paralyzed Veterans*, 477 U.S. at 605, and in refusing to expand Title IX liability to cover the acts of non-recipients in *Gebser*, 118 S. Ct. at 1998. *See* Pet. Br. 17-18.[7] The Title IX contract is the thread that holds this Court's Title IX jurisprudence together; there is no reason to unravel it here, simply for the purpose of extending coverage to the NCAA.[8]

Confronted with the Spending Clause, respondent and her amici try a different tack. First, they urge this Court to invoke some kind of inherent authority to extend Title IX to the non-recipient NCAA, tautologically citing *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. at 71, for the proposition that "[f]ederal courts have the power to 'award any appropriate relief' necessary to remedy a

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[6] The seat-of-the-pants nature of this interpretation is underscored by the Solicitor General's caveat that "[t]here is an important difference between the scope of petitioner's obligation as a controlling authority and the scope of its obligations if it is found to be the recipient itself." U.S. Br. 21 n.3. According to the Solicitor General, "[i]f the petitioner is a recipient, all of its operations are covered by Title IX"; but "[i]f petitioner is not a recipient, it is covered by Title IX only to the extent that it exercises controlling authority over the [program]." *Id.* This distinction not only finds no support in the statute, but directly contradicts the principle of institution-wide coverage codified in 20 U.S.C. § 1687.

[7] Respondent claims that *Grove City College* v. *Bell*, 465 U.S. 555 (1984), proves her point that Title IX may be extended beyond recipients that have entered into a "contractual relationship with the Government." Resp. Br. 29. But that case arose because the federal government demanded that the college execute a written assurance—*i.e.*, contract—"agree[ing] to '[c]omply * * * with Title IX.'" 465 U.S. at 560 (quoting assurance). Because the Court concluded that the college was the congressionally intended recipient of the federal aid to students, it held that the government could "demand that the College execute [such] Assurance." *Id.* at 574. Far from advancing respondent's cause, therefore, *Grove City* underscores the contractual nature of Title IX.

[8] As we explained in our opening brief (pp. 17-18), the notice required in implementing Spending Clause legislation alone precludes extending Title IX to the NCAA. Respondent and the Solicitor General disingenuously suggest that there is no notice problem because respondent seeks to hold the NCAA liable only for its own alleged acts. Resp. Br. 30; U.S. Br. 9, 25. But the notice to which the NCAA is entitled before Title IX may be enforced against it is that it is covered. *See Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) (emphasis added) ("There can, of course, be no knowing acceptance if a [recipient] is unaware of the conditions [to which it will be held] or is unable to ascertain what is expected of it."); Pet. Br. 17-18. That is why the agency requires all recipients—direct or, as *Grove City* indicates, indirect—to execute written assurances agreeing to comply with Title IX. *See* 34 C.F.R. § 106.4. *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992) and *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985)—cited by the Solicitor General (Br. 25)—are by no means to the contrary; they involved school district defendants that had indisputably entered into the Title IX contract.

violation." Resp. Br. 21 (quoting *Franklin*). But it was clear that the defendant in *Franklin*—a public school district—was covered by Title IX as a recipient; the question was "what remedies are available" when Title IX is enforced against a *recipient* through an implied right of action. 503 U.S. at 65.

Next, they cite *Salinas* v. *United States,* 118 S. Ct. 469 (1997), for the proposition that "Congress has constitutional authority to reach the conduct of anyone who threatens 'the integrity and proper operation of [a] federal program.' " U.S. Br. 26; *see* Resp. Br. 29. But even accepting that premise,[9] the question in this case is not whether Congress could regulate the NCAA, if it chose to. It is whether Congress intended Title IX, as enacted, to apply to non-recipients such as the NCAA. As we have explained, the answer to that question is plainly no, a conclusion that is alone compelled by "Title IX's contractual nature." *Gebser,* 118 S. Ct. at 1998.

The notion that Title IX applies to non-recipients involved in, or even responsible for, the operation of federally assisted programs is also contradicted by the regulations. As the Solicitor General acknowledges, the Title IX regulations "impose obligations only on *recipients,*" which of course squares with the statute. U.S. Br. 24 n.4 (emphasis added). *See* Pet. Br. 32-33. And—as the Solicitor General points out—simply "operating an education program that benefits from federal financial assistance is *not* sufficient by itself to make an entity a recipient." U.S. Br. 13 (emphasis added). Yet that is precisely the standard that respondent and, in effect, the Solicitor General ask this Court to adopt, arguing—in the face of not only the regulations, but also the statute and this Court's precedents—that "[Title IX] is best read to extend coverage to all entities with authority over the operation of federally-assisted programs or activities," "whether or not [they] receive[] federal assistance." Resp. Br. 18.

[9] As the Court made clear in the very paragraph upon which respondent and the Solicitor General rely, the Court's decision in *Salinas* was directed to the discrete issue of "the constitutionality of [18 U.S.C.] § 666(a)(1)(B) as applied to the facts of this case," an issue about which there was "no serious doubt." 118 S. Ct. at 475. The language quoted by respondent and the Solicitor General is plucked from a sentence that does not come close to stating the general rule set forth by respondent and the Solicitor General here. *See id.* ("The preferential treatment accorded to him was a threat to the integrity and proper operation of the federal program.").

In addition, even if it had footing in the statute or this Court's precedents, the "control" test has little to commend it as a practical matter. "Controlling authority" or "effective control" (U.S. Br. 21, 22) is a murky, fact-specific concept ill-suited for a threshold jurisdictional determination such as whether Title IX—or the other program-specific statutes with the same federal funding trigger—apply. *See* Pet. Br. 24-25. Indeed, while respondent and her amici baldly assert that "[t]he NCAA was assigned authority over the operation of federally-assisted intercollegiate athletic programs," Resp. Br. 11, this is news to the NCAA. As we explained in our opening brief (p. 23), the NCAA constitution provides that "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the *institution itself.*" NCAA const. art. 6.01.1 (emphasis added). *See also id.* art. 1.2 (a fundamental purpose of the NCAA is "[t]o uphold the principle of institutional control of, and responsibility for, all intercollegiate sports"). To be sure, the NCAA plays an important role in intercollegiate athletics; but, at the same time, there is no basis for concluding that colleges and universities have simply turned over the store to it, as respondent and her amici suggest.[10]

[10] Respondent refers to the alleged "assignment" of authority from colleges and universities to the NCAA as if there were some kind of formal instrument with which we should all be familiar. *See* Resp. Br. 41, 42. There is not. If there were, one would expect to find it in the NCAA constitution. But, as discussed, that charter adopts as one of its canons "[t]he principle of *institutional* control and responsibility" over intercollegiate athletics. NCAA const. art. 2.1 (emphasis added).

Moreover, while respondent would purport to limit the Title IX liability of non-recipients to the "unusual circumstance where an entity with authority over a federally-assisted program is not the entity that receives Federal assistance," Resp. Br. 12, this limitation is entirely superficial. If—as respondent and the Solicitor General assert—the implied right of action under Title IX imposes liability for any "discrimination '*under* any education program or activity receiving Federal financial assistance,'" *id.* 17 (quoting Title IX); *see* U.S. Br. 20-21, liability should be imposed on *everyone* acting under such a program—from the faculty responsible for implementing the institution's educational program, to the company hired to bus students to and from school, to the concessionaire hired to sell soft drinks at the school's athletic events—even though none of these individuals or entities has entered into the Title IX contract, or is an intended target of the statute. Federal funding recipients—especially educational institutions—depend on scores of others to implement their programs. Adopting the "ceded authority" argument here would render all of these third parties vulnerable to Title IX actions.[11]

Finally, respondent's policy argument that Title IX "must cover the NCAA," or else "it cannot conceivably achieve its goal," proves too much. Resp. Br. 1, 43-44. While new gains may always be made, Title IX—as respondent's own amici note, *see* Nat'l Women's Law Center ("NWL") Br. 25-26—has been very successful since its enactment in 1971 in leveling the playing field for women and men in intercollegiate athletics. During this period, Title IX has never been enforced against the NCAA. The reason is plain: no one—least of all the federal government, which took a contrary position in the *Califano* case—believed Title IX applied to the NCAA. *See* Pet. Br. 33-34. At the same time, the agency crafted a regulatory scheme that subjects recipient institutions to Title IX liability for any discrimination in intercollegiate athletics, and specifically provides that their duty to comply with Title IX "is not obviated or alleviated by any rule or regulation of any * * * athletic * * * association" to which they belong. 34 C.F.R. § 106.6(c).

[11] Respondent claims that holding that Title IX extends beyond recipients would not threaten individuals. *See* Resp. Br. 19 n.12. The Solicitor General is more forthright, saying the question is not presented here. U.S. Br. 27-28 n.5. But the writing is on the wall. If Title IX were extended to non-recipient entities that operate federally assisted programs, there would be no straight-faced basis for concluding that individuals with the same authority are not covered.

In the early days of this regime, concern was expressed—similar to that expressed by respondent and her amici here—that this scheme would be ineffective because it would leave colleges and universities with a dilemma in deciding whether to abide by athletic association rules or determinations that might subject them to Title IX actions. In response, the agency held firm to its regulations, explaining that athletic association "rules do not prohibit choices that would result in compliance with Title IX," and, in any event, "[s]ince all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve collectively any wide-spread Title IX compliance problems resulting from association rules." 44 Fed. Reg. 71413, 71422 (Dec. 11, 1979). Despite the sky-is-falling tone of respondent's amici, that regulatory regime has proved successful in reducing gender discrimination in intercollegiate athletics, while at the same time respecting Title IX's congressionally intended and constitutionally permissible reach. *See* Pet. Br. 34-35.

III. THE NCAA IS NOT COVERED BY TITLE IX AS A RECIPIENT.

Tellingly, respondent does not argue that the NCAA is covered by Title IX as a *recipient* until more than two-thirds of the way through her brief. When she does, she focuses on "a claim not addressed by the [Court of Appeals], not presented by the question on which [the Court] granted certiorari, and accordingly, not before this Court," *Hudson* v. *McMillian*, 503 U.S. at 12—*i.e.*, that the NCAA receives federal funds through the National Youth

Sports Program Fund ("NYSP").[12] As discussed above, this Court's practice is to decline to entertain such arguments in the first instance, without the benefit of lower court decisions and a fully developed record. *See, e.g., United States* v. *Bestfoods*, 118 S. Ct. 1876, 1890 (1998) (declining to "decid[e] in the first instance an issue on which the trial and appellate courts did not focus," and stating that "[p]rudence thus counsels us to remand"); *supra* at 3. There is no reason to plunge forward in the absence of such a record or consideration below here.

In any event, respondent's argument that the NCAA is a direct recipient of the grant to the NYSP, *see* Resp. Br. 35-36, fails for two independent reasons. First, however broadly it is construed, the amended complaint does not allege that the NCAA is a direct recipient of *any* federal aid, let alone the NYSP's. *See* note 18, *infra*. Second, as respondent herself acknowledges (Br. 36), the NYSP—a duly incorporated Missouri corporation—is a "separate entity" from the NCAA. There is no basis, therefore, for characterizing the "separate" NYSP as "part" of the

[12] As we explained in our opening brief (p. 13 n.7), respondent first mentioned this argument—consisting, *in toto*, of two sentences in her 25-page appellate brief, *see* Br. for Appellant (3d Cir.) at 5, 22—in the Court of Appeals. And the Third Circuit—which "has consistently held that it will not consider issues that are raised for the first time on appeal," *Harris* v. *City of Philadelphia*, 35 F.3d 840, 845 (3d Cir. 1994)—did not address it. *See also LIU* v. *Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("a passing reference to an issue * * * will not suffice to bring that issue before this court") (quotation omitted).

The thirteenth-hour nature of this argument is underscored by the extraordinary lengths to which respondent and her amici have gone in lodging with this Court, or referring to, materials outside the record in *this* case, treating the Court as if it were a trier of fact, rather than of the legal questions presented on certiorari. *See* Resp. Br. 39 n.27; U.S. Br. 19-20; Bowers Br. A1-A4; Trial Lawyers Br. 3 n.3. Such tactics have "consistently been condemned by th[is] Court." Robert L. Stern, *et al., Supreme Court Practice* 555 (7th ed. 1993) (citing cases).

NCAA.[13] Presumably, that explains why the Solicitor General—whose brief "reflects the joint views" of the agency that administers the NYSP grant, U.S. Br. 24 n.4—does not support respondent's direct recipient theory.[14]

The argument that the NCAA is an *indirect* recipient of the NYSP grant fares no better. *See* Resp. Br. 39-40; U.S. Br. 18-19. As we explained in our opening brief (pp. 15-17, 20-21 & n.11), and as the Solicitor General has underscored, "[t]his Court's decisions * * * draw a firm distinction between an entity that is an *intended recipient* that indirectly receives federal financial assistance

[13] For this reason, the Court should also reject respondent's passing suggestion that the NCAA is covered due to the NYSP grant pursuant to 20 U.S.C. § 1687. *See* Resp. Br. 39-41. As we explained in our opening brief (pp. 29-31), Section 1687 codified the principle of institution-wide coverage, under which an entity's entire operations are covered by Title IX if "any part of [the entity] is extended Federal financial assistance." 20 U.S.C. § 1687. Because it is a separate corporate entity, the NYSP is not "part" of the NCAA, *id.*; if Section 1687 somehow made it so, the provision would have codified far more than the principle of *institution*-wide coverage. Yet, when it enacted Section 1687, Congress made clear that it does "not change in any way who is a recipient," S. Rep. No. 100-64, at 28 (1987), and, thus, covered by Title IX in the first place.

[14] Nor is the NCAA subject to Title IX based on its interrelationship with the NYSP, as respondent's amici argue. *See* Trial Lawyers Br. 16-17. It is axiomatic that in all but the rarest case the corporate form will be respected, even when a plaintiff can show that it was "deliberately adopted * * * in order to secure its advantages." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946). *See New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 441 (1934). There is nothing in the record of this case—nor anything in the other materials cited by respondent's amici—to warrant disregarding the NYSP's corporate form; nor anything unusual about the fact that the NCAA interacts with it—as a separate corporate entity. In any event, as we explained in our opening brief (pp. 24-25), this Court has already repudiated the notion that entities may be covered by Title IX, "not because they had received federal financial assistance, but because they are 'inextricably intertwined' with an [entity] that has." *Paralyzed Veterans*, 477 U.S. at 610.

through an intermediary and an entity that merely benefits economically from federal funding. The former is subject to coverage, while the latter is not." U.S. Br. 11 (emphasis added). *Grove City*—and this Court's reading of that case in *Paralyzed Veterans*, 477 U.S. at 606-607—make clear that congressional intent is the touchstone of the indirect recipient determination. *See* 465 U.S. at 569, discussed at Pet. Br. 15-17. Thus, "only if *Congress* intended for petitioner to be a recipient of [the NYSP] grant[]" would the NCAA qualify as an indirect recipient. U.S. Br. 12 (emphasis added). Neither respondent nor her amici, however, offer any basis—and there is none—to conclude that the NCAA is the congressionally intended recipient of the grant to the separate NYSP.[15]

Respondent comes closest to defending the Third Circuit decision in arguing that the NCAA is "an indirect recipient of Federal assistance from its member institutions." Resp. Br. 41. Even here, though, she does not argue that the receipt of membership dues is enough to subject the NCAA to Title IX. Instead, she argues that the NCAA's receipt of "dues," along with the members' alleged assignment of authority to the NCAA over the "operation of their intercollegiate athletic programs," along with "the unique nature of intercollegiate athletics"—*together*—warrant "attribution of recipient status to the NCAA." *Id.* 41, 43, 44. For the reasons we have explained in Part II above and in our opening brief, none of these factors standing alone subjects the NCAA to Title IX. Amalgamating them does not either.

[15] Given the "firm distinction" that the Solicitor General acknowledges this Court has drawn between intended but indirect recipients and mere beneficiaries, U.S. Br. 11, it is astonishing—but nevertheless quite telling—that he asserts that the NCAA may be subject to Title IX on the basis of the grant to the NYSP, but then fails to cite any indication that Congress intended the NCAA to be the recipient of those funds. While they are not part of the record in this case, the letters to which the Solicitor General refers (pp. 19-20) also do not point to any indication that the NCAA is the intended recipient of the NYSP's funds, but instead merely categorically state that the NCAA receives funds "through" the NYSP. That is not true. But if it were, the NCAA also receives dues payments "through" its member schools, but—as we have explained and the Solicitor General agrees (Br. 12)—that does not subject it to Title IX.

More fundamentally, there is no basis for "attribut[ing] * * * recipient status to the NCAA" (Resp. Br. 44) merely because it plays an important role in intercollegiate athletics. The Solicitor General agrees. As he has explained, the NCAA may not be covered as "an indirect recipient of federal assistance" to its member schools, unless that is one of the "intended purposes of the assistance extended by Congress to [its] members." U.S. Br. 15. And neither respondent nor her amici has provided any indication—because there is none—that *Congress* intended the NCAA to be the indirect recipient of such assistance. *See* Pet. Br. 16-17.[16]

Respondent also argues that the NCAA "indirectly receives Federal assistance as described by the CRRA because it is an 'operation' of its federally-assisted member institutions." Resp. Br. 46 (quoting 20 U.S.C. § 1687). As we explained in our opening brief (pp. 30-32), and the Solicitor General echoes, the CRRA merely "establish[ed] coverage for all programs of a *recipient* institution. It 'does not change in any way who is a recipient of federal financial assistance,' or 'overrule or alter' this Court's holding in [*Paralyzed Veterans*]." U.S. Br. 15 (quoting S. Rep. No. 100-64, at 28-29; emphasis added).

[16] Nor does the NCAA fit within the regulatory definition of recipient as a "subunit, successor, assignee, or transferee" of member institutions. 34 C.F.R. § 106.2(h); *see* NWL Br. 9. These are established corporate terms that do not cover the relationship between the NCAA and its members, in which—pursuant to the NCAA constitution—members retain institutional control over intercollegiate athletics. *Se* Pet. Br. 23-24; *supra* at 9. Indeed, the example cited by respondent's amici involves the quite different situation where a recipient formally "subcontracts" work that is the subject of a federal grant. NWL Br. 9 n.17. That may explain why the Solicitor General does not join this argument and, instead, emphasizes that "operating" a federally assisted program does not subject a non-recipient to Title IX. U.S. Br. 13.

Thus, while the CRRA indisputably subjects "all of the operations of * * * a *college* [or] *university*"—including its athletics program—to Title IX, as long as "any part of [the institution] is extended Federal financial assistance," 20 U.S.C. § 1687(2)(A) (emphasis added), it does not sweep within Title IX's reach entities, such as the NCAA, that are not covered recipients in the first place. Otherwise, Section 1687 would extend Title IX to any entity involved with the operation of a federally assisted program—regardless of whether it is itself a recipient—in clear conflict with Congress' intent. *See* Pet. Br. 31-32.

Similarly, the NCAA is not swept within Title IX by Section 1687(4), as an entity established between two or more covered entities. *See* NWL Br. 19. As the structure of Section 1687 makes clear, the phrase "any part of which is extended Federal financial assistance" refers back to "all of the operations" of the entity in question. 20 U.S.C. § 1687. *See* U.S. Br. 15 (Section 1687 "establish[es] coverage for all programs of a *recipient* institution") (emphasis added). Section 1687(4) accordingly is of no avail to respondent unless she could show that the *NCAA itself* receives federal financial assistance, regardless of whether its members do. *See* S. Rep. No. 100-64, at 4 (under Section 1687(4) "the entire entity is covered if *it* receives any federal aid") (emphasis added); Pet. Br. 31. If she could, then "all of the [NCAA's] operations" would be covered, 20 U.S.C. § 1687, but, as we have explained, she cannot.[17] In any event, any reliance on Section 1687 to extend Title IX to the NCAA is suspect, since it is clear Congress did not intend that provi-

[17] This reading does not, as the NWL (Br. 20) suggests, render Section 1687(4) superfluous. Section 1687(4) ensures that an entity formed by two or more entities described in Section (1), (2), or (3) is covered in "all of [its] operations" if any part of *that entity* receives assistance; without Section 1687(4), such coverage would depend on how the entity was categorized under Sections 1687(1), (2), or (3). The Solicitor General (Br. 14, 21 n.3) recognizes that Section 1687(4) serves this role.

sion to expand coverage to entities—such as the NCAA—that were not recipients under preexisting law. That is presumably why the Solicitor General, for one, does not rely on Section 1687 in arguing on respondent's behalf.

IV. THE AMENDED COMPLAINT FAILS TO STATE A TITLE IX CLAIM AGAINST THE NCAA.

Finally, contrary to the suggestion of respondent (Resp. Br. 33-34) and the Solicitor General (U.S. Br. 17), the judgment below may not be affirmed solely on the basis of the amended complaint's allegation that: " 'The NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance.' " Pet. App. 18a (quoting Am. Compl.).[18] This is not a factual allegation at all, but a legal conclusion that simply parrots the Title IX regulation. *See* 34 C.F.R. § 106.2(h) ("recipient" includes an entity "to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance"). There are no *factual* allegations in the complaint which, if true, would support that conclusion as a matter of law, and certainly no allegations about the NYSP. In fact, the "bare allegation" (U.S. Br. 18) quoted above—the only one respondent and the Solicitor General can point to in the complaint—is scarcely more illuminating than the allegation that "the NCAA is covered by Title IX because it is."

Even under the notice pleading rules, this conclusory legal assertion is insufficient to state a Title IX claim

[18] The amended complaint does not allege that the NCAA is a *direct* recipient of federal funds, and, as we explain below, statements in an appellate brief cannot correct that. *See* Opp. Br. 7 n.2 (acknowledging that respondent would be required to "amend her complaint on remand * * * [to] allege that the NCAA is a direct recipient * * * as an alternative basis for holding that the NCAA is subject to Title IX").

against the NCAA. *See Campbell* v. *City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss") (quotation omitted); *Perkins* v. *Silverstein*, 939 F.2d 463, 467 (7th Cir. 1991) ("general statements of the law which were lifted verbatim from federal statutes, regulations and case law" fail to state claim).[19] Indeed, the "bare allegation" that the NCAA is an indirect recipient—unaccompanied by any supporting factual allegations that would render it such, if true—is no different than the conclusory allegation that diversity jurisdiction lies, without factual allegations as to the residence of the parties that, if true, would establish such jurisdiction.

While respondent is entitled to argue that the facts alleged in her amended complaint, if true, would state a claim against the NCAA under Title IX, she is limited to those facts and reasonable inferences drawn therefrom.

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[19] *Accord Berner* v. *Delahanty*, 129 F.3d 20, 25 (1st Cir. 1997); *Palda* v. *General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995); *Clegg* v. *Cult Awareness Network*, 18 F.3d 752, 756 (9th Cir. 1994); *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 n.28 (2d ed. 1990 & Supp. 1998) (collecting cases); 2A *Moore's Federal Practice* ¶ 12.07[2.-5], at 12-64 n.6 (2d ed. 1991) (same).

This Court's decision in *Conley* v. *Gibson*, 355 U.S. 41 (1957), cited by the Solicitor General (U.S. Br. 17), is not to the contrary. As one court of appeals recently put it, "[w]hile *Conley* permits a pleader to enjoy all favorable inferences from *facts* that have been pleaded, [it] does not permit conclusory statements to substitute for minimally sufficient factual allegations." *Electronics Communications Corp.* v. *Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997) (emphasis added; quotation omitted). *See also Riddle* v. *Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996) (under *Conley* standard, "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based," even if the plaintiff is *pro se*) (quotation omitted); *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (*Conley* "requires more than the bare assertion of legal conclusions").

She cannot save her complaint based on facts alleged in her (or her amici's) legal briefs. *See Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("As the case comes to us, we must assume that the [plaintiff] can prove the facts *alleged in its amended complaint*. It is not, however, proper to assume that the [plaintiff] can prove facts that it has not alleged.") (emphasis added); *City of Pittsburgh* v. *West Penn Power Co.*, 147 F.3d 256, 263 n.13 (3d Cir. 1998) (same); *see also Palda* v. *General Dynamics Corp.*, 47 F.3d at 875 ("we will not look beyond the four corners of the complaint itself to determine whether [plaintiff] can state a claim"). Indeed, even the Solicitor General agrees that "the sufficiency of [respondent's] amended complaint" should be "judged by the allegations in that complaint." U.S. Br. 18.[20]

For this reason, the courts below went *further* than they were required to in entertaining respondent's argument that the NCAA is subject to Title IX because it "receives dues from member institutions, which receive federal funds." Pet. App. 19a. As the Solicitor General points out, "[t]he only place in which respondent referred to dues was in her legal memorandum opposing petitioner's motion to dismiss her original complaint." U.S. Br. 18. But there is no reason for this Court to compound the error—and make new law on the standards for judging the sufficiency of a complaint—by considering the adequacy of other factual assertions that not only are outside the amended complaint, but were not properly raised or

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[20] The First Circuit in *Gooley* v. *Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988), faced a situation similar to the one presented here, where the "plaintiff seem[ed] to have shifted his approach" in defending a claim on a motion to dismiss, raising new factual assertions "in his appellate brief—though nowhere in [his] amended complaint." The court of appeals rebuked this tactic, emphasizing that—"[m]odern notions of 'notice pleading' notwithstanding"—a plaintiff "is nonetheless required to set forth [adequate] factual allegations" in his complaint. *Id.*

passed upon below. Instead, the Court should follow its settled practice and deal with the case as it came here. The Court should answer the question on which it granted certiorari, set aside the erroneous Third Circuit judgment, and, if it deems it appropriate to do so, remand for further proceedings.

CONCLUSION

For the foregoing reasons, and those in petitioner's opening brief, the judgment of the Third Circuit below should be reversed.

Respectfully submitted,

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